Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

KEM L. RALPH,
(individually and doing business as
Ralph Brothers Farms),

Petitioner,

v.

MONSANTO COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

I. Whether and to what extent a District Judge has discretion in ruling on a motion that he recuse from "any proceeding in which his impartiality might reasonably be questioned," when the Congress has enacted that he "***shall*** disqualify himself." 28 U.S.C. § 455(a) (emphasis supplied).

II. Whether the standard of review of a District Judge's refusal, under 28 U.S.C. § 455(a), should be *de novo*.

III. Whether under the totality of the circumstances now known, and within the meaning and contemplation of 28 U.S.C. § 455(a), a reasonable person would harbor doubts regarding the impartiality of Judge Rodney W. Sippel to have presided over the proceedings in *Monsanto Co. v. Kem L. Ralph, et al..*, E. D. Mo., No. 00-CV-135-RWS, filed January 28, 2000, given that

(A) as a private practicing lawyer, he was formally counsel of record for Monsanto Company from August 11, 1997 until January 30, 1998, in other important litigation;

(B) his former law firm represented Monsanto in other substantial litigation prior to his become a U. S. District Judge;

(C) he made no disclosure of his or his former firm's prior representation of Monsanto Company, 28 U.S.C. § 455(e);

(D) he refused to allow reasonable discovery, incident to a motion to recuse under 28 U.S.C. § 455(a), regarding his and his former firm's prior representation of Monsanto Company.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner Kem L. Ralph states that he is a farmer who has done business as Ralph Brothers Farms and has been a partner with his brother, Roger M. Ralph, in a partnership known as Ralph Brothers Farms.

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PETITION FOR A WRIT OF CERTIORARI AND/OR A WRIT OF MANDAMUS

Petitioner Kem L. Ralph respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit dated February 14, 2005. In addition, Petitioner respectfully requests a writ of mandamus directing that District Judge Rodney W. Sippel recuse himself in the premises.

OPINIONS BELOW

The Court of Appeals entered a Judgment on February 14, 2005 without opinion. *Monsanto Co. v. Ralph,* 122 Fed. Appx. 510 (Fed. Cir. 2005). App. 1. On March 4, 2004, the U. S. District Court for the Eastern District of Missouri delivered an oral bench denying Defendants' request for discovery and finally denying Defendants' Motion For Relief From Judgment grounded in 28 U.S.C. § 455(a). App. 4-24.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 14, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTES INVOLVED

28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> * * * * *
>
> (e) . . . . Where the ground for disqualification arises only under subsection (a), waiver may be

accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

INTRODUCTION

We trust there is no more "important federal question" than the public's reasonable view of the fairness and impartiality of a U. S. District Judge who is charged to exercise vast discretionary powers. The work begun in *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847 (1988) remains substantially unfinished. The unfinished work affords a safe harbor for federal judges who will not or cannot accept the congressional mandate that their impartiality to sit in a given case "shall" be judged objectively from the perspective of the reasonable person on the street. 28 U.S.C. § 455(a).

Here, Monsanto Company, a former client of the District Judge – just one year, 363 days earlier the District Judge was formally counsel of record for Monsanto – has benefited substantially from the District Judge's exercise of his powers in a series of highly discretionary rulings that will, when enforced, all but ruin the farmer Petitioner. More important than this eye catcher, the District Judge's former law firm represented Monsanto in a number of other substantial matters while the District Judge was an equity partner. In a final peremptory exercise of discretion, the District Judge denied reasonable discovery on the recusal issues and summarily denied the motion itself only eight days after it was filed.

The matter is of moment to more than Petitioner. Farmers across America are forced to defend their farms in that Judge's district – the Eastern District of Missouri – by reason of Monsanto's forum selection clause. *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1294-96 (Fed. Cir. 2002), *cert. den.*, 537 U. S. 1232 (2003).

Congress spoke in 1974, enacting today's 28 U.S.C. § 455(a). There is work to be done as "general propositions do not decide concrete cases," *Lochner v. N.Y.*, 198 U.S. 45, 76 (1905) (dissenting opinion). Section 455(a) and *Liljeberg* state only general propositions.

District Judges claim broad discretion in deciding motions for recusal under Section 455(a)'s general propositions. This is exacerbated by the abuse of discretion standard of review enforced in most courts of appeal,[1] including the Eighth Circuit, the applicable regional circuit.[2] *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*). In conflict, the Seventh Circuit sensibly conducts *de novo* review, *viz.*, *Hook v. McDade*, 89 F.3d 350, 354-55 (7th Cir. 1996); *Taylor v. O'Grady*, 888 F.2d 1476, 1481 (7th Cir. 1989), and the Third Circuit is moving in that direction, *see In Re Kensington Int'l Ltd.*, 368 F.3d 289, 301 fn. 12 (3rd Cir. 2004), noting that Section 455 employs the mandatory "shall." In "abuse of discretion" circuits, there are regular dissents. *See, e.g., In Re Billedeaux*, 972 F.2d 104, 106-07 (5th Cir. 1992) (DeMoss, J., dissenting); *In Re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1321 (2nd Cir. 1988) (Lumbard, J., dissenting).

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[1] *See, e.g., Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979); *U. S. v. Arena*, 180 F.3d 380, 399 (2nd Cir. 1999); *U. S. v. Wilensky*, 757 F.2d 594, 599-600 (3rd Cir. 1985); *Shaw v. Martin*, 733 F.2d 304, 308 (4th Cir. 1984); *U. S. v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999); *Easley v. Univ. of Mich. Bd. of Regents*, 906 F.2d 1143, 1147(6th Cir. 1990) (implicitly endorsing the "abuse of discretion standard); *U. S. v. Martin*, 278 F.3d, 988, 1005 (9th Cir. 2002); *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987); *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1567 (Fed. Cir. 1989) (applying the law of the 9th Circuit, the relevant Circuit in that case).

[2] On non-patent issues, the Federal Circuit applies the law of the circuit in which the case arose. *See Slip Track Sys., Inc.*, 304 F.3d 1256, 1262 (Fed. Cir. 2002); *and Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1567 (Fed. Cir. 1989) (applying the law of the 9th Circuit, the relevant Circuit in that case).

And so this case calls the Court to consider what the late Prof. Lon L. Fuller called "the most complex of all the desiderata that make up the internal morality of the law: congruence between official action and the law." *See* Lon L. Fuller, The Morality Of Law 81 (1964). This case exemplifies how layers upon layers of discretion undermine 28 U.S.C. § 455(a) and create a deadly disconnect between "official action" – what judges do in fact – "and the law" the Congress has written.

STATEMENT OF THE CASE

Kem L. Ralph is a farmer who lives just west of Covington, Tennessee. Mr. Ralph grows cotton, soybeans and corn on farmlands primarily in his home county of Tipton, with smaller tracts in neighboring Shelby and Haywood Counties in western Tennessee. A239-40. Mr. Ralph farms with his brother as Ralph Brothers Farms, a partnership. A238-40.

On January 28, 2000, Monsanto Company sued Mr. Ralph in the Eastern District of Missouri [St. Louis] for infringement of patents claiming herbicide tolerant and insect resistant seed trait products. In lay terminology, the Complaint charged Mr. Ralph with saving seed and selling "brown bag" seed, said to be infringing uses and sales of Monsanto's patented Roundup Ready and Bollgard trait products in Mr. Ralph's 1999 and 2000 soybean and cotton crops. Mr. Ralph had substantial defenses, including the fact that his name had been forged on the Monsanto Technology License Agreement which contained the forum selection clause that forced him to defend in St. Louis in the first place.

The case was assigned to U. S. District Judge Rodney W. Sippel. Judge Sippel did not disclose, see 28 U.S.C. § 455(e), that, until January 30, 1998, he was formally counsel of record for Monsanto in important litigation against Pioneer Hi-Bred International regarding the same patented

herbicide tolerant and insect resistant trait products. More importantly, Judge Sippel did not disclose that, prior to January 30, 1998, Husch & Eppenberger, the St. Louis based law firm in which then lawyer Sippel was an equity partner and served as Vice Chair of the Litigation Department, had represented Monsanto in a substantial number of other lawsuits.

In the proceedings below, Judge Sippel made important discretionary rulings, imposing on Mr. Ralph the most severe sanctions possible. On February 17, 2000, the District Judge refused to transfer the case from St. Louis to Memphis, Mr. Ralph's home district. On October 10, 2001, the District Court struck the Defendants' Answer, refused to consider his documented defense that his signature was forged on the contract containing the forum selection clause, dismissed substantial counterclaims, and ordered the case to trial on damages only. A273-74. On February 15, 2002, the District Court ordered Mr. Ralph to pay Monsanto $104,506.47 in additional sanctions. *Monsanto Co. v. Ralph*, 2002 U. S. Dist. LEXIS 27164 (E.D. Mo. 2002).

On June 17, 2003, following the damages only trial, the District Judge engaged in a devastating exercise of discretion when he trebled the compensatory damages awarded by the jury from $803,402 to $2,410,206, the maximum allowed by law, 35 U.S.C. § 284, and on top of that ordered that Mr. Ralph pay Monsanto another $500,000 plus in attorneys fees and costs. 35 U.S.C. § 285. On July 9, 2003, the District Court entered Judgment in favor of Monsanto and against Mr. Ralph in the aggregate amount of $2,937,527.07.

Six months later to the day, *The New York Times* published an article about another Eastern District of Missouri farmer case against Monsanto, assigned to Judge Sippel. The article states that "Before Mr. Sippel became a federal judge [in late January, 1998], Husch & Eppenberger

worked for Monsanto on about 16 lawsuits." A720. If this were so, it is clear beyond *per adventure* that when Judge Sippel was assigned the case of *Monsanto Co. v. Ralph*, No. 4:00-CV-135-RWS, his impartiality to sit in judgment in this case might reasonably be questioned, so that recusal became mandatory. 28 U.S.C. § 455(a). To this day, no on-the-record disclosure has been made. *See* 28 U.S.C. § 455(e).

Counsel for Mr. Ralph followed the leads that appeared from the *New York Times* article. On February 24, 2004, Mr. Ralph filed his Motion For Relief From Judgment And For Other Auxiliary Relief,[3] predicated on 28 U.S.C. § 455(a) and (b)(2). A877. Mr. Ralph sensibly sought discovery prior to the hearing on the Motion. A346-51, A839-76.

The Fed. R. Civ. P. 60(b)(6) Motion arose from matters that were not reasonably knowable to counsel prior to January 7, 2004. A721-23, A891-93. The District Judge had made disclosure of far more benign matters, and counsel reasonably assumed that, if there were further facts that might arguably impact the judge's impartiality under 28 U.S.C. § 455(a), they would be disclosed.

The discovery requests included interrogatories and requests for production to Monsanto, and a Fed. R. Civ. P. 45 subpoena to Husch & Eppenberger to produce documents. Mr. Ralph sought details about "Husch & Eppenberger work[ing] for Monsanto on about 16 lawsuits," details of Husch & Eppenberger's other representation of Monsanto while Sippel was an equity partner in that firm, and other matters relevant to the 28 U.S.C. § 455(a) recusal inquiry, such as the compensation Sippel received from his firm's representation of Monsanto. A350, A885.

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[3] *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847 (1988) holds that a motion under Fed. R. Civ. P. 60(b)(6), filed in the District Court, is the proper procedural vehicle for presenting the substantive issues of recusal, the central basis for which began to come to counsel's attention for the first time after final judgment.

On March 4, 2004, the District Court entered its final order in the form of a bench ruling, summarily denying Defendants' Motion For Relief From Judgment And For Other Auxiliary Relief, eight days after the Motion had been filed. The District Judge rejected out of hand Mr. Ralph's suggestion that he was entitled to reasonable discovery regarding facts reported in the *New York Times* article, and the implications of those facts.

On September 7, 2004, the Court of Appeals affirmed both the discretionary sanctions order, striking Defendants' Answer and Counterclaims and assessing $104,506.47 in damages, and, in addition, the Judgment for $2,937,527.07. *Monsanto Co. v. Ralph*, 382 F.3d 1374 (Fed. Cir. 2004). There can be no doubt that substantially softer sanctions would also have been affirmed, including sanctions leaving Defendants' pleadings, defenses and counterclaims in tact.

On February 14, 2005, the Court of Appeals, acting without written opinion, affirmed the District Court's denial of Petitioner's Fed. R. Civ. P. 60(b)(6) Motion predicated on Section 455(a). *Monsanto Co. v. Ralph*, 122 Fed. Appx. 510 (Fed. Cir. 2005).

REASONS FOR GRANTING THE WRIT

I. The Conflict Among The Circuits

The Federal Circuit presumably followed the Eighth Circuit, the applicable regional circuit, which holds the decisions of District Judges on Section 455(a) are viewable for abuse of discretion only. *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*En Banc*). Numerous other Circuits hold that the denial of a motion to recuse is reviewed for abuse of discretion. See footnote 1, *supra*. At least one Circuit has recognized the problem in this. The Seventh Circuit reviews the denial of a motion to recuse under Section 455 *de novo*. *U. S. v. Balistrieri*, 779 F.2d 1191, 1203 (7th Cir. 1985), notes:

> We think that appellate review of a judge's decision not to disqualify himself, when he is asked to do so by a proper and timely motion supported by affidavits and perhaps other evidence, should not be deferential. The motion puts into issue the integrity of the court's judgment. The absence of the requirement that the judge take the factual averments of the moving party's affidavit as true 'gives the chance for the evil against which the section is directed.' In addition, a judge may be especially reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved. Accordingly, we will review decisions against disqualification under 28 U.S.C. § 455(b)(1) *de novo*. We will evaluate the evidence for ourselves, applying the same standard as the district court. (internal citations omitted).

See also, Taylor v. O'Grady, 888 F.2d 1189, 1201 (7th Cir. 1989) ("Appellate review of such claims is *de novo*, and the standard of proof is whether a reasonable person would be convinced that the judge was biased"). The Seventh Circuit explicitly applied *de novo* review to a Section 455(a) motion in *Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996).

Dissents in both the Fifth and Second Circuits also support heightened review when a judge denies a motion for recusal. In *In the Matter of Billedeaux*, 972 F2d 104, 107 (5th Cir. 1992), Judge DeMoss, dissenting, noted:

> Perhaps if the question were posed in the abstract , you would get a different answer; but my gut tells me that if the average person is asked whether he would feel comfortable having his own personal injury case tried by a judge whose spouse was a partner in a law firm that represented the defendant in other matters, the answer would be, 'Would the

> judge really be impartial?' I think that question is reasonable; and the mandatory language of § 455 requires recusal.

See also, In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1321 (2nd Cir. 1988).

The facts in this case are even worse than in *Billedeaux*. Here, the District Judge himself was an equity partner in a law firm that represented Monsanto in numerous high profile cases, from which he almost certainly received a share of those fees and profits. The District Judge served as counsel of record for Monsanto for four months, only two years prior to being assigned to this case, and other similar cases in which Monsanto was a party. He personally signed an Entry of Appearance and a Notice of Withdrawal as Counsel in at least one other case in which Monsanto was a party. Moreover, Judge Sippel made numerous harsh and adverse, discretionary rulings that are at best questionable under the circumstances. And when all of these facts were brought to his attention, he refused either to recuse himself and vacate the judgment or to allow reasonable discovery into these matters. These facts are more than sufficient that a reasonable person, knowing all the facts of the case, reasonably would question the judge's impartiality.

The conflict among the Circuits, regarding the appropriate standard of review when a judge denies a motion for recusal under 28 U.S.C. § 455 requires this Court's attention. Sup. Ct. R. 10(a). The question is of practical importance, as judges are no more able to apply generalized tests [such as that imposed by Section 455(a)] objectively to themselves than are the rest of humankind. The standard of review should be *de novo*, or at least the discretion normally accorded the trial judge should be appropriately narrowed.

II. The Court Failed To Follow *Liljeberg*

However wisely the Court may have decided *Sao Paulo, et al. v. Am. Tobacco Co.*, 535 U.S. 229 (2002), that *per curiam* opinion was seized upon by the District Judge as a way around the apparent mandate of the controlling precedent. *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847 (1988). *Sao Paulo* is particularly attractive to Judges who will not or cannot accept that their impartiality is reasonably subject to the reasonable judgment of "the average person on the street who knows all the relevant facts of a case." *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002), and who believe that they have "a duty to sit."[4] These trial judges know that their findings will be secure under the abuse of discretion standard of review.

The District Judge's bench ruling in the case at bar shows how easily *Liljeberg's* reasoned elaboration of 28 U.S.C. § 455(a) may be avoided. By affirming the District Court's multifaceted (mis)application of erroneous legal standards, the Court of Appeals "has decided an important federal question in a way that conflicts with the relevant decisions of this Court." Sup. Ct. R. Rule 10(c).

III. The Aggravating Circumstance of Monsanto's Forum Selection Clause, Forcing Farmers To Defend Themselves In St. Louis

Farmers around the country are directly affected by these issues. Monsanto requires that farmers sign a technology license agreement, if they wish to use Monsanto's patented Roundup Ready, Bollgard and other seed traits. These form agreements require the farmer to

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[4] Section 455(a) did away with the "duty to sit" doctrine. H.Rep.No. 93-1453, 93d Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News, 6351, 6355 (1974). *See, e.g., Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979); *U. S. v. Wolfson*, 558 F.2d 59, 63 (2nd Cir. 1977); *U. S. v. Ritter*, 540 F.2d 459, 462 (10th Cir. 1976).

submit to suit in St. Louis – Monsanto's home town – whether the farmer lives and farms in North Carolina, Minnesota or California. *McFarling*, 302 F.3d at 1294-96, declared this forum selection clause wholly enforceable. Farmers who resist find themselves and their lawsuits routinely transferred to the Eastern District of Missouri. *See e.g., McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290 (M. D. Ga. 2003).

Monsanto has recently sued a number of farmers for breach of the forum selection clause, asking that all be transferred to its St. Louis backyard. See *Monsanto Co. v. Bandy, et al.*, 04-CV-708-ERW (E.D. Mo. 2004), Complaint at ¶42. As a result, hundreds of farmers have been forced to defend themselves far from home and at great expense.[5] As much as any litigants in America, these farmers who are not lawyers are entitled to the absolute assurance – once they get to St. Louis – of an impartial district judge who will

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[5] At least five farmers from afar have found their cases assigned to Judge Sippel:

(1) On February 11, 1998, Monsanto filed its Complaint in *Monsanto Co. v. Knackmus*, E.D.Mo., No. 4:98-CV-261-RWS, which was assigned to Judge Sippel just two weeks he took the bench. A716-17. *Knackmus* was a suit by Monsanto against a seed saving farmer from Southeast Illinois.

(2) The case at bar was filed January 28, 2000.

(3) On November 6, 2000, Monsanto filed suit in St. Louis against Wayne Douglas White and Ronnie Edward White, farmers from Pasquotank County, North Carolina. *Monsanto Co. v. White*, E.D.Mo., 4:00-CV-1761-RWS. A749-55.

(4) On February 15, 2001, Monsanto filed suit in St. Louis against Garland Ray Harris, a farmer from Elizabeth City, North Carolina. *Monsanto Co. v. Harris*, E.D.Mo., 01-CV-253-RWS, and was assigned to Judge Sippel. A756-62.

(5) On December 11, 2001, Monsanto filed suit in St. Louis against Scott Miller and Scott Miller Farms, of Alexander County, Illinois. *Monsanto Co. v. Miller*, E.D.Mo., No. 4:01-CV-1938-RWS, and was assigned to Judge Sippel. A763-66.

show Monsanto no favoritism. These farmers are entitled to know that the district judges in St. Louis will scrupulously regard Section 455(a).

IV. Because *Liljeberg* Stopped Short, The Court Should Flesh Out The Nuances Of 28 U.S.C. § 455(a) That The Authority Of The District Judge And The Court Of Appeals May Be Practicably And Appropriately Cabined

A. Reasonable Discovery Supporting The Section 455(a) Motion, And The Average Person On The Street's Certain Perception Of The Denial Of Reasonable Discovery

This case presents important nuances to 28 U.S.C. § 455(a) recusal motions in ways that "ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). These include the movant's right to reasonable discovery. These also include the effect on the average person's reasonable perception of the District Judge's denial of reasonable and pointed discovery where full affirmative responses would mandate recusal, or, on the other hand, would end the inquiry, *if there are no grounds for recusal.*

1. Discovery On Section 455 Motions To Recuse

Reasonable discovery will often be required for a proper presentation of a Section 455 recusal motion. Reasonable discovery should be allowed in Fed R. Civ. P. 60(b)(6) requests, so long as the party acted in good faith and made out a reasonable case that discovery might lead to relevant information. See Fed. R. Civ. P. 26(b)(1). Judge Alex Kozinski makes the point in *U. S. v. State Of Wash.*, 98 F.3d 1159 (9th Cir. 1996), *viz.*

> [I]magine a newspaper report that Judge X secretly owned stock in a corporation that was a party before him some years ago. And imagine that the article

> reveals the name of a broker who maintained the judge's clandestine account. Surely the losing party would be entitled to obtain discovery from the broker to help figure out whether the judge had a financial stake in the outcome of the case. This is because the judge's stock ownership would have been grounds for disqualification under 28 U.S.C. § 455.

U. S. v. State of Wash., 98 F.3d at 1166 (concurring opinion). Judge Kozinski leaves no doubt that a party bringing a post-judgment Rule 60(b)(6) *Liljeberg* motion under these facts would be entitled to reasonable discovery. The Third Circuit has accepted this view in *In Re Kensingston Int'l Ltd.*, 368 F.3d 289, 300 (3rd Cir. 2004); and *In Re Kensingston Int'l Ltd.*, 353 F.3d 211, 214, 223 (3rd Cir. 2003).

Notwithstanding, the Court of Appeals has ruled contrary to this, affirming the District Judge's denial of an entirely reasonable request for discovery. This case exemplifies the need that this Court make clear that reasonable discovery should be allowed on Section 455(a) recusal motions. The point "has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

2. *The Common Sense Effect Of The District Judge's Denial of Reasonable Discovery On The Perception Of The Reasonable Person On The Streets*

There is no way around the fact that a district judge who denies reasonable discovery such as that proffered here leaves the "the average person on the street who knows all the relevant facts of a case" with the certain understanding that the judge is hiding something important. The denial of such discovery is one of "the relevant facts of a case" within the meaning of 28 U.S.C. § 455(a).

B. The District Judge's Course Or Pattern Of Rulings

The *En Banc* Eighth Circuit has held that "a judge's course or pattern of rulings" is among the circumstances that a reasonable person would consider. *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002). Here, the District Judge made a number of discretionary rulings, each of which was as harsh as it practically could have been against Mr. Ralph and in favor of Monsanto. This is particularly suspect when Monsanto is the former client of the District Judge and his former law firm. As noted above, the District Judge exercised his discretion in the harshest manner possible.

The reason it is so important that the District Judge not only be impartial, but that he also appear impartial is that "[a] finding of willful infringement [only] authorizes but does not mandate an award of increased damages." *Modine Mfg. Co. v. Allen Group, Inc.*, 917 F.2d 538, 543 (Fed. Cir. 1990). Here the District Judge ordered damages trebled in the face of any number of prior cases that counseled substantially lesser enhancement of damages, or no enhancement at all. *See, e.g., Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 866-67 (Fed. Cir. 1997) (damages enhanced by only 10 percent, though infringement willful); *Bott v. Four Star Corp.*, 229 USPQ 241, 255 (E. D. Mich. 1985), *vacated on other grounds*, 807 F.2d 1567 (Fed. Cir. 1986) (damages increased by 20 percent); *Century Wrecker Corp. v. E. R. Ruske Mfg. Co.*, 913 F. Supp. 1256, 1291, 1295 (N. D. Iowa, 1996); *Am. Med. Sys., Inc. v. Med. Eng. Corp.*, 6 F.3d 1523, 1526 (Fed. Cir. 1993) (damages enhanced 1.5 times); *Datascope Corp. v. SMEC, Inc.*, 14 U.S.P.Q. 2d 1071, 1074 (D.N.J. 1990) (50 percent enhancement)

If – as is surely the case – consideration of "prior rulings" extends to other similar cases involving the same party favored in the case at bar and to the District Judge's conduct of proceedings on the recusal motion itself, it is important that this Court say so and say why. This was not

the first time Judge Sippel struck the pleadings of a Monsanto opponent and imposed sanctions. On February 25, 2002, Judge Sippel entered an order in *Massey v. Monsanto Co.*, E. D. Mo., No. 00-CV-1125, dismissing the Complaint with prejudice and imposing monetary sanctions of $55,100.44 against plaintiffs and in favor of Monsanto. A747.

If – as is surely the case – the *Moran* view is correct and it extends to other similar cases, involving the same party favored in the case at bar, and, as well, to the judge's conduct of proceedings on the recusal motion itself, it is important that this Court say so and say why. "A judge's course or pattern of rulings" is among the relevant facts of a case" that "the average person on the street" would consider, but this Court has never said so.

C. The Forgetful District Judge

Liljeberg was about a forgetful District Judge. This Court wrote,

> The judge's forgetfulness . . . is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. [citing authority] Under Section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all of the circumstances, would expect that the judge would have actual knowledge.

Liljeberg, 486 U.S. at 860-61. A judge's "failure to disqualify himself [that] was the product of a temporary lapse of memory . . . [may] nevertheless [be] a plain violation of the terms of the statute [28 U.S.C. § 455]." *Liljeberg*, 486 U.S. at 861.

Here the District Judge also "forgot." On January 29, 1998, Judge Sippel's personally signed Notice Of Withdrawal as counsel for Monsanto was "filed" in the *Pioneer* case. A353. Judge Sippel was formally counsel of record for Monsanto from August 11, 1997 until January 30, 1998, when District Judge Richard Webber signed "Granted, 1/30/98" on Judge Sippel's Notice of Withdrawal. A353. The record shows that eleven envelopes respecting the *Pioneer* case, bearing the return address of the Office of the Clerk of the United States District Court, landed on Sippel's desk between August 11, 1997 and January 30, 1998. The average person on the streets is simply not going to believe that a lawyer, no matter how busy he is, is unaware of eleven envelopes from the Office of the Clerk of the United States District Court addressed to that lawyer. Yet Judge Sippel emphatically denied that Monsanto had been his client or that he was aware that he was counsel of record for Monsanto.

Judge Sippel repeatedly stated that he knew nothing about the case:

> "[L]et me be abundantly candid, so that there is no confusion: I was not aware of the Pioneer against Monsanto case." A813-14.
>
> "I never knew about the Pioneer against Monsanto case, and I didn't know anything about it, ..." A814.
>
> "[I]t's hard to disclose a case you don't know about that you never did anything on." A816.
>
> "Let me assure you that the word "participation" is as universally inclusive as I can humanly make it. I did not participate in the Pioneer against Monsanto case." A819.

> ". . . I didn't have any knowledge, no actual knowledge, no knowledge whatsoever, and no participation – no anything." A822.

The District Judge denied that his former law firm's prior representation of Monsanto was relevant. "The issue, you understand today, is not Husch & Eppenberger. It's me." A952. "And if a former client of my firm [Husch] is represented by another firm, that's not a reason for recusal." A953, A984-86, A988, A994.

The circumstance where the district judge may have forgotten his and his firm's substantial prior involvement with a client who now appears as a litigant before that district judge, presents important questions that "ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Where that same former client appears, as here, at least four more times before the same district judge, the "average person on the street" surely at some point may expect that district judge to remember. And, if the district judge does not, his "impartiality might reasonably be questioned" by the "average person on the street."

D. The Presumption Of Access To Former Client Confidences

Given his formal attorney-client relationship with Monsanto, Judge Sippel is "conclusively presumed" to have "obtained confidential information about the [Monsanto side of the] issues in the [*Pioneer*] litigation." *Restatement (Third) Of The Law Governing Lawyers* § 132, com. *d*(*iii*). "The attorney client relationship raises an irrefutable presumption that confidences were disclosed." *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977); *see also, State of Ark. v. Dean Foods Prods. Co.*, 605 F.2d 380, 384 (8th Cir. 1979). The *Fred Weber* opinion explains that this irrefutable "presumption is an absolute necessity . . . ," *Fred Weber*, 566 F.2d at 608, citing and relying on *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2nd Cir. 1973).

According to Prof. Geoffrey Hazard, "The inference . . . is that Judge Sippel may have 'personal knowledge of disputed evidentiary facts' involved in the [*Pioneer*] proceeding." A1006. "Counsel for Monsanto in the prior litigation are presumed to have learned confidences from Monsanto about the Pioneer relationship and as well had a duty of loyalty to Monsanto as [a] client." A1005. Prof. Hazard presumes that Judge Sippel had access to confidential information because Prof. Hazard knows that is the law. *Fred Weber*, 566 F.2d at 608.

The problem is that this Court has never spoken to this important nuance of the former client problem under 28 U.S.C. § 455(a). It should do so now.

E. The Exacerbating Of Affirmance Without Opinion

In the face of the District Judge's facially deficient handling of the recusal motion, the Court of Appeals affirmed without opinion. The fair minded and objective third party observer – "the average person on the street" – would reasonably consider this little short of "sweeping under the rug" the "unreported" action of the District Judge. In this, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, [and/]or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In addition, a writ of mandamus should issue to order recusal of the District Judge.

Respectfully submitted, this 12th day of May, 2005.

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-1304

MONSANTO COMPANY,

Plaintiff-Appellee,

v.

KEM L. RALPH,

(individually and doing business as Ralph Brothers Farms),

Defendant-Appellant.

Judgment

[ENTERED FEBRUARY 14, 2005]

ON APPEAL from the UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

In CASE NO(S). 4:00-CV-135

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (MAYER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and CLEVENGER, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED FEB 14 2005

/s/ Jan Horbaly
Jan Horbaly, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:00-CV-135
	)	
KEM RALPH, INDIVIDUALLY, and d/b/a RALPH BROTHERS FARMS, A Partnership,	)	
	)	
	)	
	)	
Defendants.	)	

COPY

MOTION HEARING

BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

MARCH 4, 2004

[ENTERED MARCH 4, 2004]

APPEARANCES:

For Plaintiff: Joseph C. Orlet, Esq.
Erik L. Hansell, Esq.
HUSCH AND EPPENBERGER, LLC

For Defendants: James L. Robertson, Esq.
WISE AND CARTER

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PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

THE COURT: Okay. Obviously, it's abundantly clear, I suspect, but for those who later read this transcript, this issue was discussed at some length in the Samples, or Blades case, depending on what moniker you give it. I think even the Eighth Circuit calls it the McIntosh case.

The appellee's briefs have been filed in that case. Unfortunately, I don't have the benefit of reading them because they're under seal in the Eighth Circuit. I think that seal, though, is not permanent. I think there's a period of redaction time and so on.

But I suspect that this issue is percolating in that case; although, I don't know that. I haven't heard from either counsel. And since I haven't seen the briefs, I don't know if that's part of the appeal. I would be shocked if it wasn't. I mean, I'm interested in knowing what the Eighth Circuit thinks about it. We can all learn, obviously.

But for those at the federal circuit who may read this at a later time, I do believe this issue is under submission or will be shortly at the Eighth Circuit, and obviously, as I understand it, the transcript of my ruling in Blades is part of some filings now with the federal circuit. Is that right?

MR. ROBERTSON: It was part of the file here, and what we filed here we also submitted to the federal circuit.

THE COURT: I assume what you were doing was seeking remand under Rule 60 for me to do something.

MR. ROBERTSON: I was respecting the fact that in my life, up until about three weeks ago, I always thought if a case was on appeal, you had to ask permission of the Court of Appeals to proceed in any way in the district court. And that was a request for permission to do so and, specifically, to permit Your Honor to rule.

THE COURT: Okay. Well, we will save -- I think we have saved the federal circuit law clerks some time by having explained what the jurisdiction is here, because they obviously have to look at a lot of circuits for the procedural rules, and not every circuit is consistent on how a Rule 60 motion should be heard.

If we are going to share new knowledge, I think the most interesting thing is when a Rule 60 motion is filed in district court after the Court of Appeals has ruled, and then you have some strange opportunity for the district court to affect the outcome of an already-ruled Court of Appeals decision, but we won't get in that circle here. We don't need that.

The reason I wanted to have this hearing today is that I do think it's in all of our best interest to clarify these issues as soon as possible, as thoughtfully as possible, and have the federal circuit have the benefit of what we've done and/or haven't done. We've obviously spent now in excess of four years together. I don't know that we benefit or anybody benefits from protracted litigation, whether it's the client who has to pay the bills or the lawyers who are spending their time on the case.

One of the values, of course, of our system is that we do seek finality, so we can conduct ourselves accordingly, and that's what I'm attempting to do today.

The overarching concern, too, is that, as everybody here knows, the public has to have confidence that when they come to this building, they will get a fair and impartial hearing. In that regard, Congress has adopted a statute -- and justice is all of our business. We know that.

But Congress has adopted a statute governing when a judge should and should not recuse himself. There are countervailing considerations. A judge is not to recuse him-or

herself unnecessarily because then that undermines the confidence in the judicial system that the selection of the judge is no longer random but becomes manipulated or arbitrary, and that's not good.

There is more than one consideration at work here. A party -- and so we look at the Eighth Circuit law. And a party that introduces a motion to recuse, as we know, carries a heavy burden of proof. A judge is presumed to be impartial, and the party seeking disqualification bears the substantial burden of proving otherwise. I'm citing Pope v. Federal Express, 974 F.2d 982, citing Ouachita National Bank v. Tosco Corporation, 686 F.2d 1291.

Well, what do we know? We have -- and everybody has probably had the benefit of reading my ruling in the Blades case. There is an entry of appearance not signed by me in a Pioneer case involving Monsanto. Involves a Bt corn licensing agreement as I understand it.

I hate to relive these memories, but in the time that my name was put on that case, I was involved in the anti-trust case against the National Football League. That case went to trial the first week of October of 1997. So I have told the lawyers in Blades, and I will tell you, that I was not working on anything else but the St. Louis Convention and Visitors Commission case against the National Football League arising out of the transfer of the Rams to St. Louis and the attendant monies that were paid, or extracted as the case may be, by the National Football League from St. Louis and the Rams.

That case went to trial the first week of October, and before I finished that case, or before it was over, I had been confirmed by the United States Senate as a U.S. district judge. I had my confirmation hearing at the Senate Judiciary Committee while that case was going on, and the vote on my confirmation all were done while I was in trial. And that trial

lasted for --it was supposed to last two months. It lasted in excess of a month. And in the period leading up to that, that's all I was working on.

So as Mr. Leonatti ably stated, it is not uncommon to have your name put on a file even though you don't work on it or don't know anything about it. And as the affidavit by Mr. Conran in the file says, he anticipated that if, when that case was over, that that might be something I would work on, but it never came to pass because I wrapped up my legal practice and went on the bench.

So if there's any confusion about how it could be, how my name was on a file, the explanation is actually quite simple and direct. That's just -- that's what we know. We'll reach some inferences and conclusions from that. So I never worked on the Pioneer case.

What we do know and which I wasn't sure of in the Blades case until I saw the affidavits from Husch & Eppenberger is whether I had ever billed any time to Monsanto in the years leading up to my time leaving private practice. I didn't think I had. I had no recollection.

It's clear now from the affidavits that from 1995 to 1998, in the three years I was at Husch before I went on the bench, I didn't do any work for Monsanto. I didn't go to any meetings. I know what I didn't -- I didn't go to any meetings. I didn't talk to any partners about Monsanto cases. I didn't participate in the preparation of any Monsanto cases or in the discovery of any Monsanto cases.

And I will assure you that if I had, I would have billed my time, because lawyers are not in the business of giving away their time if they can help it. There are, as you know, incredible hourly billable -- hourly billable pressures on attorneys. And the affidavits from the firm now comport

with my recollection that I didn't work on any Monsanto cases.

We know, too, that from 1993 to 1995 I was not at Husch & Eppenberger. I was on the congressional staff of Congressman Gephardt. So for five years before I went on the bench, I didn't do any legal work for Monsanto. And I can tell you I know I didn't do any litigation involving seeds for Monsanto.

I don't know when seed litigation started. You all probably know better. I don't know when Bt – any of the biogenetically altered seeds for cotton or soybean or corn went on the market, but I suspect it was after 1993. Can anybody answer that question for me so the record is clear?

MR. ORLET: It is my understanding, Your Honor, that the genetically modified soybeans and cotton and corn were first available on a limited basis in 1995, and then commercial -- certain products were commercialized in 1996. And there was --so there would have been no litigation prior to that time.

THE COURT: And certainly we all know that these technology agreements have this venue provision in them so if those cases found their way to the Eastern District of Missouri, I'm sure Mr. Robertson, in his diligent search of the court's records, would have found my name on any of the seed cases that were here. But he didn't find any because there aren't any.

And, Mr. Robertson, you suggested this all came to you from a reporter from the New York Times. You won't be surprised to know that he tried to call me. His first question to me was: Why didn't you disclose your relationship with Husch & Eppenberger in the Blades case?

An interesting question, since Husch & Eppenberger wasn't in the Blades case. But that was what he wanted to

know. Because I had -- he apparently concluded I had disclosed it in the Kem Ralph case; why hadn't I disclosed it in another case where Husch & Eppenberger wasn't even attorneys of record for anybody?

So I'm not sure that the reporting by this business reporter in Chicago is very probative of any legal standards or any legal expertise, given the approach, at least as I understood it, as it was presented to me. Let's talk about how this case got here and then to me.

First and foremost, I was sworn in in January of 1998. This case was filed, not by much, but more than two years later in this jurisdiction, and I drew it. At that time, this case was filed by lawyers at the law firm known as Thompson Coburn. Having not done any work for Monsanto, not having certainly worked on anything like this, there was no moment to contemplate whether I should hear this case. When you look at the canons, 3.3-1 – I have to find the right cite.

The fact that a party to litigation is in other matters a client of the judge's former law firm does not necessitate recusal. The mere fact that Monsanto was in this court represented by Thompson Coburn, and the mere fact that Monsanto had been a client of my firm is not a basis for recusal. The canons are clear about that. And the litigation proceeded then for two years after that with Thompson Coburn representing Monsanto in this case.

Then in January of 2002, if I recall the time line correctly, these attorneys and others left the law firm of Thompson Coburn and joined my former law firm at Husch & Eppenberger. I'm now four years on the bench. I've never heard a single case with Husch & Eppenberger.

I consulted with members of the Code of Conduct Committee. I did not seek a formal opinion, but I did consult

with members of the Code of Conduct Committee, the Judicial Conference of the United States, and it was suggested to me clearly then that I had a duty to continue the case, because I have a duty to hear cases that are assigned to me, and that this was not a basis for my recusal that these lawyers had now joined my old firm.

I had never practiced law with them. I had never participated in any litigation with them. I hadn't done anything -- I didn't know these people.

So it became clear, based upon my reading of the canons and my conversations with members of the Code of Conduct Committee, that as what happens over time, as law firms change their character and their members, you now have to begin deciding which attorneys, not entire law firms, you should recuse from, because again, I'm putting an inappropriate and unnecessary burden on other attorneys if substantial numbers of attorneys in this case -- I don't know, how much was it, thirty?

MR. ORLET: About twenty-five.

THE COURT: Twenty-five lawyers moved from Thompson Coburn to my old firm. There was no reason to treat those twenty-five lawyers any different than any other lawyer in St. Louis. I had never practiced law with them. I had no prior relationship with them.

I would submit to you there are attorneys outside of Husch & Eppenberger with whom I have significant personal relationships I wouldn't hear cases with. So then I have to begin substituting that judgment then at Husch Eppenberger: Which of those attorneys fall in the category of people that I have significant relationships with that would raise the question of -- question my impartiality? So I took the case. I made sure that everyone knew that this change would --

what effect it had, but it didn't, of course, change my analysis that I should hear the case.

So let's go to the statute. That's where we start in every case. Isn't that what they teach you in law school? You have to always start with the law. We have to look at 28 U.S.C. 445.

What do we know? Strangely enough, the really absolute provision is not the first section. Section 455(b)(2), where the private practice he served as lawyer –okay. He shall disqualify himself in the following circumstances: (b) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer had been a material witness concerning it.

That's why it's so important to understand the answer to the question about whether the parties contend this is the same matter in controversy, because if it is, it doesn't matter if my name appeared on a document or didn't appear on a document or I knew about the case or not, because if it is the same matter in controversy as the Pioneer/Monsanto Bt corn license litigation, that's the end of the analysis. I should recuse myself, I guess leave it to somebody or myself to vacate the rulings and move on.

This case is about Mr. Kem Ralph who possessed some genetically modified seed, soybean and cotton specifically, that was patented by Monsanto. The gravamen of the claim is that despite his obligation to only plant it for one season, he saved it, delinted it, and planted it again. As we all know, Monsanto sued him, claiming to enforce a technology agreement and force their patent rights under the soybean and cotton.

If we look at the Little Rock decision that Judge Arnold wrote this week, he observes what causes us such trouble here in part. The term "matter in controversy" is not defined by the statute. He concludes that this deliberate choice by Congress demonstrates an intent that the words "matter in controversy" mean something other than what we commonly refer to as a case.

He cites the prior Little Rock decision. And again, we're talking about desegregations cases in Little Rock, Arkansas, and says in that case, earlier case in 1988 – tell you how long that litigation lasted – we discussed but did not decide whether a matter in controversy could extend beyond a single case.

They concluded --he concluded in that case that the judge in Arkansas, while he had been involved in mandamus proceedings involving that same case but in the course of representation had never addressed the merits of that case or expressed any opinion about them – there were four companion cases; one had been severed – the issues before the judge in the present matter were wholly unrelated to his prior representation.

I do not think – well, let me make another observation. The Pioneer/Monsanto case, which has been made reference here, was pending, I think, for two years while the Kem Ralph case was pending. In the same building. And I have no doubt, given the quality of lawyering that's gone on in this case, that if they were the same matter in controversy, one of two things would have happened: I would have had a request to transfer this case to Judge Webber, because out of judicial economy and interest to the parties they would be combined or at least combined for discovery because they would be so closely related to be the same matter in controversy; or I would have heard all about that Pioneer/Monsanto litigation and how it affected the Kem Ralph case.

Neither of those things are true. There was no effort to consolidate, join discovery, or engage in any discussion that these cases were the same matter in controversy.

I do not think any reasonable person, knowing the facts of the two pieces of litigation, would conclude that these are the same matters in controversy. And I don't think you need any discovery to figure that out. I think it's clear on the face. I don't think you need to look behind anything. I think it's obvious. And I think it's so obvious that no reasonable person, knowing the facts, would reach that conclusion.

Therefore, my recusal under 455(b)(2) is not required. Of course, you know that's just the beginning of the analysis, and I apologize for being so lengthy.

Then we have to look to 455(a). Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

And I understand in part the social traction that might arise from the plain language of that, but that's not the standard -- you have to look at how the case law has been interpreted to reach the conclusion as to what that is. Would the average person, knowing the facts, conclude that the judge's impartiality might reasonably be questioned?

Now, we know that on one overarching level -- and we know this, unless you're unwilling to take my word for it --that I don't have access to any information from Monsanto, never had anything to do with the Pioneer/Monsanto litigation. Knowing that fact, there is no reason to question my impartiality.

And second, we go to the -- we can go to the canons. If a former client of the judge is a party -- and notice, it's not former client of the firm. If a former client of the judge is a party, but the litigation is totally unrelated to the earlier

representation, whether recusal is required depends upon such factors as the length of time since the earlier representation ended, the nature, duration, and intensity of the earlier representation, the presence or absence of ongoing personal relationships, et cetera. Regardless of these factors, however, it is generally inadvisable for a judge to preside in a former client's case until at least two years after the earlier representation ended.

I don't believe Monsanto is a former client of mine. Mine. Notice it said "of the judge," not "of the law firm." Words have meaning. Even giving your argument that my withdrawing from this case that I never worked on made that a representation, I drew this case two years after I came on the bench. There could be no more minimal participation, no more minimal relationship than what you've described on the record here today.

No amount of discovery of Monsanto's relationship with Husch Eppenberger, whatever it is or isn't, doesn't change my relationship or clear lack thereof with Monsanto in determining whether I should recuse in this case.

These are not the same parties. They are not the same issues. We know it's not the same matter in controversy. It's not even the same seed. I will give you that seeds are involved, but that's not enough commonality to even start this conversation, much less rise to the level of recusal.

I do believe that the Tobacco Brazil case is much more analogous to the situation than the case where the judge sat in meetings and discussed about property that was needed to build a hospital and then ruled on the land at a later time. Even this is not the end of the analysis.

The last question is, do I have any personal knowledge of confidential information, facts that would cause

bias or impartiality, and I think that's clearly been established as no.

I'm deeply troubled by the planting throughout the defendant's brief of other cases that have been filed here that, again, are of no moment in this case. There is no standard that because I was a partner at Husch, and Husch had a client that was Monsanto, that I'm precluded from hearing Monsanto cases at a later time unless they were my client. So the suggestion that the mere fact that legal fees were paid by Monsanto to my former firm is not a reason to recuse.

If it were, there wouldn't be the specific admonition that I'm to hear cases with former clients if they're represented by other firms, even during the time period I'm not hearing cases with my former firm. That's not the test. There is no basis for that argument.

There is a suggestion that because – I enjoyed this. There's an anti-trust case I've never read called Monsanto against Spray-Rite Service Corporation, a Supreme Court case decided in 1984. I didn't pass the bar until 1982. I can assure you that whatever that case is, is of no moment to me. And I know that neither of those parties would let me argue that case in Supreme Court eighteen months after I got out of law school, or less. It was printed in '84. We know it was probably argued in late '83.

There is a cite to a miscellaneous case, Plant Genetics System, N.V. v. Ciba Seeds, a Mycogen Plant Science. That was a Charles Shaw case in 1997 where there was a motion to quash a subpoena. That has nothing to do with me, but yet it's used here to make some point that I don't understand.

There was a case in North Carolina where they fought about whether a subpoena should or shouldn't be enforced, and it was resolved without a ruling by the Court. But

apparently Husch & Eppenberger was local counsel for one of the parties, and it's cited in here.

And what's interesting, too, is this motion reads as if -- and suggests that I had a duty and an obligation to disclose to Mr. Ralph my relationship with Monsanto, whatever that is. Duty to disclose, while it seems to be the cornerstone of this argument, is a totally false issue, because if this was the same matter in controversy, no amount of disclosure will solve that.

Let me go to the statute again to make that point. There is a lot of suggestion in here that I had an obligation to disclose, and I don't believe that, like I said, any amount of disclosure would cure -- I know it wouldn't cure the matter in controversy issue.

Usually disclosure comes up if there is a personal relationship or a relative in the case and you disclose it, but in my conversations with members of the Code of Conduct Committee, what the scholarly writings they provide judges at judge school, is that except in these extraordinary circumstances where there might be a personal relationship, the judge is to make the determination about whether disclosure applies -- disqualification is appropriate or not. You are not to turn the conduct of your courtroom over to attorneys, and in fact, it puts the attorneys in a terrible position.

To disclose something that you can't waive, yet you have an obligation then to go tell your client, Oh, by the way, the judge told me this, this, and this, but he's going to stay on the case, you just don't concede the control of litigation in your courtroom.

So I think the total issue of disclosure here is, A, I don't think there was anything to disclose. Monsanto wasn't a client of mine. I understand that one withdrawal, but it had been more than two years, and I didn't consider them a client.

Either way you cut that, there's nothing to talk about in terms of disclosure.

There were also references to other cases I've handled since I came on the bench, including the Monsanto and Knackmus case which was filed in 1998, which I made no substantive rulings in. The case was settled approximately six months after it was filed. I don't know what probative value that has in this proceeding unless you're just trying to poison the well. It's just consistent with my view that Monsanto hadn't been a client and wasn't a client of mine, and I heard Monsanto cases and filed by other law firms other than Husch & Eppenberger after I came on the bench, consistent with the canons.

In fact, you've filed a number of docket sheets from those cases, I heard, which I don't think are in any way consistent with any rulings or determinations I made, but certainly don't prove or disprove anything about your motion to recuse here. If, in fact, you reach the argument that perhaps that withdrawal in that case – the only thing I did in that case – creates, makes Monsanto a client, whether I should or shouldn't have heard a case in 1998 or 1999 is of no moment about cases I heard in the year 2000.

I point to the fact that in the Blades transcript, which was attached to the motion and must have been read by counsel for Mr. Ralph, where I said, "But in this instance, I can tell you and assure you that as an attorney at Husch & Eppenberger, I never worked on any seed cases."

And in that case I also made it clear that I never participated in the Pioneer/Monsanto case. I never worked on that case. This is in quotes: "I never talked to Joe Conran about that case. I never talked to anyone at Monsanto about that case. I never read a document about that case. I never even read the complaint. That's why I was able to say it' s hard

to disclose a case you do not know about that you never did anything on."

I went on later, when I was discussing the analogy to the Tobacco Brazil case, referring to Mr. Conran, I said: "He put my name on it, but I never worked on it. I never prepared anything. I never talked to anybody. I didn't have any participation. And for those of you who are given as lawyers or want to be, and perhaps reporters" – I was talking to Mr. Shinkle from the Post Dispatch, I guess - "I don't know"– "and perhaps reporters, I don't know, do engage in mental gymnastics. What does the word 'participation' mean? What is he leaving out?" Lawyers are always going to ask that question.

"He used the word 'participation." What's the pregnant negative in that sentence? "Let me assure you" – this is a quote from then and just applicable now - "that the word 'participation' is as universally inclusive as I can humanly make it. I did not participate in the Pioneer against Monsanto case."

I went on to discuss the fact that I had not worked on Monsanto matters for at least two years before I came on the bench, which should not be taken as an inference that I must have done something earlier, because I said I never worked on any seed cases. So there can be no pregnant negative taken from that comment and taking it out of context and trying to make that sentence mean something that it is not intended to mean.

So any suggestion that I participated in any litigation involving seed companies or seed cases, and specifically saved seed cases as these have come to be known, which didn't even exist until 1995 or 1996, is without any basis in fact, because we know from the record, and from me telling you, that I did not do any work for Monsanto from 1993 until

I joined the bench, for more than five years before I joined the bench, and seven years before I drew this case.

And that doesn't mean that in 1992 I handled Monsanto cases. I'm just telling you that I know for certain for at least five years before I came on the bench I didn't handle any seed cases or any seed litigation or any saved seed litigation of any sort. To my knowledge, all the saved seed litigation was at Thompson Coburn, and that was something Husch & Eppenberger only did after the lawyers we previously discussed joined Husch & Eppenberger in the year 2002.

I almost hate to do this, but you know in the Blades case, Geoffrey Hazard, the professor at Penn, offered an opinion about whether I should recuse myself, and he concluded that the cases in Blades and the Pioneer/Monsanto case were not the same matter in controversy. I disagree with a lot of what else he says, but it's a fundamental basis.

The discussion here today was that somehow the cotton -- the corn licensing agreement might have some remote possible relation to an anti-trust discussion about soybean and corn, is too remote and too tenuous for me to consider, to be honest. But in a case of the Blades case, where there was anti-trust discussions -- that's what the whole case is about, a nationwide class-action case. The professor there couldn't find those cases to be the same matter in controversy. I think he's wrong for a lot of other reasons in his affidavit, and I don't think that it's up to professors to substitute their judgment for judges.

I think that's the best thing about today, where I started, is that we're going to get the benefit of a review from a circuit court. That's where the great thing is here, is that you will have the confidence in the outcome because you will get that independent review which is so vital to all of us.

Lastly, I have to say that as a matter of practicality, if there were other cases -- and, Mr. Robertson, you've alluded to the fact you litigate with Monsanto in more than just this case. I don't know how many cases you have against them for farmers who are involved in saved seed litigation, but it's more than one or two. In fact, it kept popping up during the course of this litigation where Mr. Orlet would try to get you not to talk about something in another case, and I'm sure you were doing the same thing to Mr. Orlet.

Let me submit to you that if there were cases out there that had an impact or effect on this case, you would know about it. Just like I concluded that since the Pioneer/Monsanto case existed in this building for two years while this case was going on, if there were other cases that had any impact on this case, I know you would know about them. You wouldn't wait four years to come in here and tell me about them. They would have an effect on the outcome of this case. There might be decisions in those cases that would be a benefit to you in this case. In fact, you would have a duty to tell me if there was a case out there on all fours that would affect a decision I had.

This isn't some mystery. These are public records. Public records. I told you personally I never entered an appearance. The only thing you've seen is that one Pioneer/Monsanto case. And I didn't enter my appearance. Joe Conran signed a document with my name on it. I did apparently sign a withdrawal. That's the only thing I did in that case.

But I know that if there were cases out there that were the same matter in controversy or affected the outcome of the Kem Ralph case, we would all know about them. They're public documents. They're not secrets.

The Pioneer/Monsanto case was in this building and in the file room. If it was so critical to this case, we would all

know about it. Much less the same matter in controversy if it affected it, we would know about it. So I find it disingenuous now, after four years of litigation, to hear that there may be cases out there that are related to this case or have an effect on this case.

And before I conclude, the canons are clear that, just like the statute, if this was related, in any way related, the two cases, the same case standard – and by "same case," I'm using Judge Arnold now. It's not necessarily has to be the identical case, but the same parties, the same issues – then I can never hear the case. That's the law of the land, and that's the canon. That's not this case. There's no basis – there is no good-faith basis to argue that I have knowledge about any matters, documents, people, meetings at Monsanto. There is just no way.

So to raise this now, at this hour, in this appeal, to suggest that there are things you don't know about, that if you were given time to conduct discovery you could figure it out, there's no basis for that argument here. There's no good-faith basis for that argument here.

Whatever Monsanto's relationship is with Husch & Eppenberger isn't the question. If you read the canons, it's about my relationship with Monsanto, what I might have known. And the fact that you're involved in all this other litigation with Monsanto and you're coming in here and suggesting that because my former law firm has a relationship with Monsanto you should be allowed to go through all of their bills and look at those, I submit, perhaps, it's more of a backdoor way in other litigation than what's going on in this case.

But there's no – you have not come forward and established any reasonable basis to conduct discovery. I haven't read a single case where Rule 60 even permitted discovery.

You had the burden of coming in here and proving bias by me, not to conduct discovery of an adversary law firm. And you haven't shown me anything. And even what little you've shown me, even if we give it its due for a moment, which I don't agree with, it doesn't establish recusal under the canons of the statute.

So we don't take that and then suddenly open the floodgates to see if maybe perhaps you can find something, because some reporter called me and said, "Why didn't you disclose your relationship with your former law firm?" when it wasn't even a participant in another case. That's not the basis to conduct discovery here, and, I submit, it's disingenuous.

There would be a substantial argument -- although I don't think it's necessary -- that if this case or these cases were so similar that I should have never heard it, that you had a duty to come in here immediately and tell me about it. You submit to me that you did, but I would submit if these cases were so similar, you would have known about them more than four years ago and not just two months ago.

That belies the argument all by itself. It falls of its own weight. If you did know about it and you waited until the outcome of this litigation, while the recusal is not waivable, you can forfeit it for failure to act on it in a timely basis, because all of us lose -- myself, you, Mr. Ralph, Monsanto -- if we lie in the weeds and wait until the litigation is done to see how it comes out before we raise the issue. You can't do that. That's not permissible. It's a unique result. While it's not waivable, it may be forfeited.

As a result, it's my conclusion to deny the request for discovery because there is no good-faith basis for it. And under 28 U.S.C. 445(b)(2), as well as Canon 3C(1)(b) of the Code of Conduct for United States Judges, a judge must

recuse in a case where the judge, quote, served as lawyer in the matter in controversy.

Similarly, the Judicial Conference on the Codes of Conduct have advised that when a judge's former client is a party to litigation and the former representation is in any way related to the current litigation, recusal is mandatory no matter how long ago the representation ended. Again, citing the Compendium of Selected Opinions, Section 3.6-5(a).

These authorities do not mandate my recusal here because any prior representation of Monsanto -- if, indeed, the listing of my name as counsel of record, even though I did no work, constituted representing Monsanto -- was not related to the litigation now pending before me. These are two entirely different cases. That is beyond dispute. And I do not believe any objective observer, knowing the facts, could reach a contrary conclusion. Therefore, in no way could these two unrelated cases be termed a single matter in controversy under the statute.

Given the lack of basis for recusal under Section 455(b), recusal under these circumstances is governed by the general appearance of partiality standard of Section 455(a), as well as Canon 3C(1) of the Code of Conduct for United States Judges, which mandates a judge's recusal, quote, in any proceeding in which his impartiality might reasonably be questioned, end quote.

The Committee on the Codes of Conduct has addressed the considerations that bear on a judge's recusal decision when a former client appears before the judge in a matter unrelated to any earlier representation.

In the opinion of the Committee, quote: If a former client of the judge -- of the judge, and I don't agree that they are. But if a former client of the judge is a party, but the litigation is totally unrelated to the earlier representation,

whether recusal is required depends upon such factors as the length of time since the earlier representation ended, the nature, duration, and intensity of the earlier representation, the presence or absence of ongoing personal relationships, et cetera. Regardless of these factors, however, it is generally inadvisable for a judge to preside in a former client's case until at least two years after the earlier representation ended. Compendium of Selected Opinions, Section 3.6-5(b).

Application of the factors spelled out by the Committee makes it clear that I should not recuse under these circumstances. In fact, it is well settled that I have a duty to hear cases unless recusal is required.

The Judicial Conference on the Codes of Conduct in its Published Advisory Opinion 52 provides: The Committee is of the view that unwarranted recusal might bring public disfavor to the bench and to the judge himself. Where the provisions of the canons point to recusal, the recusal must follow, but where the only factor presented – only factor present is supersensitivity on the part of the judge, or his distaste for the litigation, or his annoyance at a party's suggestion that he recuse himself, and nothing more, the dignity of the bench, the judge's respect for the fulfillment of his judicial duties, and a proper concern for his judicial colleagues all require the judge not recuse himself.

Which brings us to the cornerstone premise that – counter recusal, is that a judge has a duty to decide matters assigned unless disqualified. That is an equal consideration. Unless disqualified, I am required to hear the case.

Both the Congress and the Judicial Conference have provided formal mechanisms for determining whether a judge is disqualified. Quoting Judge Hansen in an Eighth Circuit case, Southwestern Bell v. FCC: Because the rules do not require my recusal, I am obliged to remain. Judges have an obligation to litigants and their colleagues not to remove

themselves needlessly, because a change of umpire in mid-contest may require a great deal of work to be redone and facilitate judge-shopping. There is as much an obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.

Application of all these factors spelled out by the Committee, spelled out by the Congress, spelled out by the case law, make it clear that I should not recuse. The duration and intensity of my earlier representation, if that's of Monsanto, if that's what you call it, is so minimal, because I did no actual work for Monsanto. My name was merely listed as counsel on certain documents filed in court by others. I have no ongoing personal relationships with people affiliated with Monsanto. It has been now over six years since any supposed representation of Monsanto ended. In sum, all of the factors identified by the Committee strongly counsel against recusal.

Therefore, the motion to conduct discovery is denied. The motion for me to recuse is denied. And I look forward to the input of the Eighth Circuit in the Blades case and the federal circuit in the Kem Ralph case. And thank you all very much for your arguments today.

(2)

Supreme Court, U.S.
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No. 04-1524

IN THE

Supreme Court of the United States

KEM L. RALPH,

Petitioner,

v.

MONSANTO COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's decision denying petitioner's motion for relief from final judgment under Fed. R. Civ. P. 60(b), which asserted that the district judge was required to recuse himself under 28 U.S.C. § 455(a).

2. Whether the court of appeals erred in affirming the district court's decision denying petitioner's request for discovery in support of his Rule 60(b) motion.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those identified in the caption.

RULE 29.6 STATEMENT

Monsanto has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 122 Fed. Appx. 510. The oral decision of the district court (Pet. App. 2-24) is unreported. A prior decision of the court of appeals is reported at 382 F.3d 1374.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2005. Pet. App. 1. The petition for a writ of certiorari was filed on May 13, 2995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. *Prior Litigation (Ralph I).*

a. This is a patent-infringement and contract dispute arising out of respondent Monsanto's efforts to protect its patented biotechnology. After investing substantial time, expertise, and expense, Monsanto developed two important recombinant DNA technologies for soybean and cotton plants. Roundup Ready® seed contains a patented gene that renders plants such as soybeans and cotton resistant to glyphosate-based herbicides, freeing growers to spray herbicides like Roundup® over their fields without harming their crops. Bollgard® cottonseed contains a patented protein that is toxic to certain insects, protecting cotton plants from damage caused by pests. Some cottonseed contains both the herbicide-tolerant and pest-resistant traits. These genetically engineered traits are claimed in several patents held by Monsanto. *See generally Monsanto Co.* v. *Ralph*, 382 F.3d 1374, 1377-1378 (Fed. Cir. 2004) ("*Ralph I*").

Monsanto licenses seed companies to incorporate its patented herbicide-tolerant and insect-resistant traits into seeds containing their own soybean and cotton germplasm and then to sell the seeds to growers, subject to certain conditions. Specifically, Monsanto requires growers who purchase seeds containing its patented biotechnology to obtain a license, typically by signing a license agreement with Monsanto. This license agreement provides that the seeds containing Monsanto's patented biotechnology are to be used "for planting a commercial crop only in a single season," and expressly states that the grower-licensee may not "save any crop produced from this seed for replanting, or supply saved seed to anyone for replanting." *Ralph I*, 382 F.3d at 1377.

Monsanto's insistence on a limited license reflects the fact that the seeds containing Monsanto's patented biotechnology self-replicate at an exponential rate, leaving licensees at the end of the growing season with an abundance of seeds that could be replanted or sold on the black market. A single Roundup Ready® soybean seed typically produces a plant

that yields 25 to 50 genetically identical seeds, and a single Bollgard® cotton seed usually produces a plant that yields 70 to 120 seeds containing Monsanto's technology. *See Ralph I* C.A. App. 3722, 3735-3736, 3830-3832.[1] Allowing soybeans or cotton containing the patented technology to be saved for replanting or sale as seed would mean that Monsanto's ability to protect or exploit its patented technology would effectively be lost as soon as the first generation of the product was introduced into the market without reasonable license restrictions.

b. On June 10, 1998, petitioner executed a license agreement and received a single-season license for Roundup Ready® soybeans and Bollgard® cottonseed. After an investigation indicated that petitioner might have saved and replanted seeds containing Monsanto's patented technology, Monsanto filed suit against petitioner in the United States District Court for the Eastern District of Missouri for breach of contract and patent infringement. The case was assigned to District Judge Rodney W. Sippel.

Monsanto requested discovery into the locations where petitioner had planted his crops and stored soybeans and cottonseed. On February 2, 2000, the district court ordered petitioner to answer Monsanto's interrogatories regarding the location of the seed, and entered a temporary restraining order preventing petitioner from tampering with any such seed until Monsanto had tested it to determine whether petitioner had made infringing use of the patented technology. *Ralph I* C.A. App. 550-552. On February 24, 2000, the district court entered an order permitting Monsanto to test areas that petitioner had identified in an affidavit, and prohibited petitioner from "selling, moving, disposing of, destroying or otherwise transferring any harvested crops, seed, or

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[1] "*Ralph I* C.A. App." refers to the physical compilation of the record filed by the parties on petitioner's appeal to the Federal Circuit in the underlying litigation. "*Ralph II* C.A. App." refers to the physical compilation filed by the parties on petitioner's appeal from the denial of his Rule 60(b) motion.

crop residue in his possession . . . until such matter is tested and sampled pursuant to this Order." *Id.* at 563. Tests of petitioner's disclosed crops and seeds confirmed that petitioner had planted about 990 bags of saved soybeans and about 400 bags of saved cottonseed in violation of the license agreement, and also had stored about 3,000 bags of saved soybeans falling within the scope of Monsanto's patent grant. *See id.* at 5358-5361.

Monsanto also learned, however, that petitioner had cleaned, treated, and delinted an additional 1,867 bags of cottonseed that had not been disclosed. On March 1, 2000, Monsanto contacted petitioner's counsel to inquire into the whereabouts of that seed. *See Ralph I* C.A. App. 631-632. On March 3, 2000, petitioner's counsel stated that petitioner had burned all of that seed and—in an apparent effort to stop Monsanto from investigating further—offered to stipulate to a rebuttable presumption that the seed contained Monsanto's patented biotechnologies. *See id.* at 633-637.

Monsanto decided to continue its investigation and took petitioner's deposition. Petitioner stated under oath at a deposition that he took all 1,867 bags of cottonseed to a gravel pit and burned them. Petitioner specifically denied selling or transferring any cottonseed. *See Ralph I* C.A. App. 599-601. At a separate deposition on August 8, 2000, petitioner repeated his story that he had burned all of the cottonseed that was saved from the 1999 crop and had not transferred any cottonseed to anyone. *Id.* at 683. This testimony was false, as Monsanto discovered through further investigation. In fact, a large number of those bags of cottonseed had not been burned but instead had been sold on the black market to other growers. *See id.* at 1257-1259, 2032-2041.[2]

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[2] Petitioner also conspired with another grower to conceal the fact that that grower had also saved cottonseed containing Monsanto's patented technology and had that cottonseed cleaned and delinted for planting in another season, in violation of his licensing agreement with Monsanto. Petitioner was eventually prosecuted for and pleaded guilty to mail

c. Monsanto moved for sanctions against petitioner in light of his violation of court orders and false statements in discovery. After an evidentiary hearing, the district court granted Monsanto's motion for sanctions. Finding that petitioner had engaged in a "systematic pattern of lying" that had prejudiced Monsanto (*Ralph I* C.A. App. 2736-2737), the court concluded that the appropriate sanction was to strike petitioner's answer, affirmative defenses, and counterclaims. *Id.* at 2738-2739. The court accordingly entered judgment for Monsanto, and ordered the case to proceed to trial only on the issue of damages. *Id.* at 2739.

The jury found that petitioner had improperly saved 1,234 bags of Roundup Ready® soybeans and 925 bags of Bollgard® cottonseed. *Ralph I* C.A. App. 4491-4492. Those findings resulted in trebled patent-infringement damages of $2,937,527.07 and, in the alternative under the license agreement's liquidated damages provision, breach of contract damages of $2,741,543.95. Final judgment was entered on July 9, 2003. *Id.* at 73-75.

d. On appeal, the Federal Circuit affirmed the district court's imposition of sanctions, including its decision to strike petitioner's pleadings. *Ralph I*, 382 F.3d at 1380-1382. The court of appeals stressed that the district court's sanction was appropriate because petitioner's misconduct had "undermined the integrity of the court and the judicial system." *Id.* at 1382. The court affirmed the award of patent infringement damages but reversed the award of liquidated damages. *Id.* at 1383-1385.

2. *Recusal/Rule 60(b) Proceedings (Ralph II).*

a. Before becoming a district court judge, Judge Sippel was a partner at the law firm of Husch & Eppenberger in St. Louis. He rejoined that firm in 1995 after serving as Chief of Staff for Congressman Richard Gephardt from 1993 to 1995. *Ralph II* C.A. App. 920. On May 15, 1997, Presi-

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fraud based on that conduct, and was sentenced to four months' imprisonment. *See Ralph I* C.A. App. 5730-5748.

dent Clinton nominated Sippel for a seat on the district court. While awaiting a decision by the Senate on his nomination, Sippel was preparing full-time for trial in a large litigation matter ("the CVC litigation") that was scheduled to go to trial in early October 1997. *See id.* at 916-917, 974.

In August 1997, Husch & Eppenberger was retained by Monsanto to serve as local counsel in a dispute between Monsanto and Pioneer Hi-Bred International, a seed manufacturer. Pioneer had filed suit against Monsanto on March 27, 1997, for breach of an agreement between the parties to develop genetically modified corn incorporating a bacterium that expresses an insecticidal protein causing the plant to repel damaging insects. *See Ralph II* C.A. App. 921-937 (Pioneer Complaint); *see also Pioneer Hi-Bred Int'l, Inc.* v. *Monsanto Co.*, No. 4:97CV01609, 2001 WL 170410, at *2 (Jan. 2, 2001), *judgment amended*, 2001 WL 34127923 (E.D. Mo. Feb. 20, 2001).

In compiling a team of lawyers who might be available to assist Monsanto's lead counsel with the Pioneer litigation, the partner in charge of the case for Husch & Eppenberger, Joseph Conran, included Sippel on the list. Although Conran knew that Sippel was not available to work on any cases other than the CVC matter at the time, Conran hoped that Sippel would become available after the CVC litigation concluded. *Ralph II* C.A. App. 916-917. On August 11, 1997, Conran filed an Entry of Appearance form listing himself, Matthew D. Menghini, and Rodney W. Sippel as counsel for Monsanto in the Pioneer case. Sippel did not sign that entry of appearance. *See id.* at 357.

Sippel's work on the CVC litigation continued throughout the summer and fall of 1997 until the trial concluded in November 1997. *See Ralph II* C.A. App. 974-975. In the meantime, Sippel's nomination to the district court was confirmed by the Senate on November 8, 1997. After winding down his practice, Sippel left Husch & Eppenberger to join the bench in January 1998. On January 27, 1998, Judge Sippel signed and served a Notice of Withdrawal as counsel for

Monsanto in the Pioneer litigation, which was granted on January 30, 1998. *Id.* at 353-354.

From August 11, 1997, when Conran first entered an appearance for Sippel in the Pioneer litigation, until January 1998, when Sippel left Husch & Eppenberger, Sippel did not spend any time working on the Pioneer case. *See Ralph II* C.A. App. 916. Sippel did not spend any time consulting with the team, participating in meetings, or reviewing documents. In fact, Judge Sippel stated on the record that he "billed no time to [the Pioneer] case," and that he "had no knowledge about that case." *Id.* at 944. The majority of documents filed in the Pioneer litigation with Sippel's name in the signature block (but not his signature) were motions for pro hac vice admission of lead counsel from Covington & Burling (*see id.* at 565-567, 570-572, 575-577, 580-582, 585-587) and a motion for leave to file a reply memorandum in excess of the page limit set by the local rules (*id.* at 654-655).

Nor did Judge Sippel work on any "saved seed" cases like this litigation or any other cases for Monsanto during his tenure at Husch & Eppenberger from 1995 until taking the bench. *See Ralph II* C.A. App. 917, 943, 958, 976. It was only in 1996 that Monsanto began marketing genetically modified seed (*see id.* at 976-977), and at least a year after that before any litigation over "saved seed" would have been possible—about the time that Sippel became a judge.

b. Judge Sippel began presiding over the instant litigation on January 28, 2000, more than two years after he joined the bench. At that time, the lawyers representing Monsanto—Joseph Orlet, Adam Miller, and Erik Hansell—were with another the law firm in St. Louis, and Husch & Eppenberger had no connection to the case. In January 2002, approximately four years after Judge Sippel went on the bench, their practice group was acquired by Husch & Eppenberger, and Orlet, Miller, and Hansell joined the new firm. At that point, Judge Sippel notified the parties of his former connection to the firm and informed them that none of the attorneys working on this litigation had been with Husch & Eppenberger before he left. Until that time, Judge

Sippel had followed a blanket policy of recusing himself from any case involving his former firm. Counsel for Ralph did not argue at that time that Judge Sippel should have recused himself. *See Ralph II* C.A. App. 968.

While Judge Sippel notified the parties of his prior connection to Husch & Eppenberger, he did not recall that he had entered an appearance in the Pioneer litigation and therefore did not disclose that fact. Counsel for petitioner supposedly first learned of that fact on January 7, 2004, when a reporter contacted him for a comment on a recusal motion filed in an antitrust case, *Blades* v. *Monsanto Co.*, No. 4:01-CV-065-RWS (E.D Mo.), in which Judge Sippel was the presiding judge. The plaintiffs in *Blades* also argued that Judge Sippel should have recused himself because of his appearance in the Pioneer litigation.

After a hearing in the *Blades* case, Judge Sippel concluded that he was not required to recuse himself. *See Ralph II* C.A. App. 819-820. During the hearing, he made clear on the record that, while at Husch & Eppenberger, he had never worked on any saved-seed cases, never worked on the Pioneer litigation, never talked to Joseph Conran about the case, never talked to anyone at Monsanto about the case, never read a document about the case, and never even read the complaint. *Id.* at 816. He therefore concluded that recusal was not required under 28 U.S.C. § 455(a) because a reasonable person, knowing that he did not work on the Pioneer case and did not have anything to do with it, would not believe that he was interested or biased. *Id.* at 819-820.

c. Despite Judge Sippel's conclusions in the *Blades* case that his recusal was not required, petitioner filed, on February 24, 2004, a motion for relief from judgment under Fed. R. Civ. P. 60(b) on the ground that Judge Sippel should have recused himself from this case.[3] Petitioner also re-

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[3] Petitioner initially invoked both 28 U.S.C. § 455(a) and § 455(b)(2) in support of his motion. In this Court he has relied solely on § 455(a). *See* Pet. for Cert. i, Questions Presented.

quested extensive discovery of, *inter alia*, information about (a) every invention which Monsanto in any way licensed to Pioneer Hi-Bred International or permitted Pioneer to use by a Development/License Agreement between Monsanto and Pioneer dated July 1, 1993, (b) every other matter initiated prior to January 30, 1998, in which any lawyer associated with Husch & Eppenberger formed an attorney-client relationship with Monsanto or provided any legal services to Monsanto (including the amount of attorney's fees that Monsanto paid for those services), (c) the total amount of attorney's fees that Monsanto paid to Husch & Eppenberger for services rendered in each year from 1990 through 1998, and (d) the date, subject matter and a description of each communication (including correspondence, emails, faxes and other documents) by Monsanto or any person on behalf of Monsanto, to, from, or with Sippel while he served in the office of Congressman Gephardt. *See Ralph II* C.A. App. 839-853.

On March 4, 2004, Judge Sippel held a hearing on petitioner's Rule 60(b) motion. *See Ralph II* C.A. App. 938-999. Judge Sippel explained that, when his name was added to the entry of appearance form in the Pioneer litigation, he "was not working on anything else but the [CVC litigation]," and before that trial was finished, he was confirmed by the Senate and started wrapping up his legal practice. *Id.* at 974-975. Because, Judge Sippel explained, the facts demonstrated that he "never had anything to do with the Pioneer/Monsanto litigation," he concluded that the average person would have no reason to question his impartiality, and therefore his recusal was not warranted under § 455(a). *Id.* at 984-985.

Finally, the court denied petitioner's motion for discovery in support of his Rule 60(b) motion. The court noted that all of the information about cases involving Monsanto and the lawyers who represent them was a matter of public record in court documents. The court also noted that the party seeking recusal has the burden of coming forward with a reasonable basis to conduct discovery. The court therefore

found that there was no good-faith basis for petitioner's discovery requests. *See Ralph II* C.A. App. 993-996.

d. Petitioner appealed the district court's denial of his Rule 60(b) motion and his motion for discovery. The court of appeals summarily affirmed. Pet. App. 1.

ARGUMENT

The court of appeals affirmed without opinion the district court's decision denying petitioner's motion for relief from judgment under Rule 60(b), which argued that the district judge should have recused himself under 28 U.S.C. § 455(a), as well as petitioner's motion for discovery in support of his Rule 60(b) motion. That summary decision presents no issue warranting this Court's review. Although petitioner argues that the courts of appeals are divided as to the proper standard of appellate review of a district judge's decision not to recuse himself under § 455(a), in fact no conflict exists on the standard of review applicable on the circumstances presented here—a Rule 60(b) motion seeking to retrospectively overturn a final judgment on the ground that the district judge should not have sat in the case. In any event, the district court's decisions to deny petitioner's Rule 60(b) motion and request for discovery in support of that motion were clearly correct. This Court should therefore deny certiorari.

1. a. Petitioner principally argues (Pet. 7-9) that this Court should grant review because the courts of appeals have supposedly reached conflicting conclusions about the proper standard of appellate review of a district court's recusal decision under 28 U.S.C. § 455(a). The Second, Third, Fifth, Eighth, and Ninth Circuits have held that such decisions are subject to review only for abuse of discretion. *See In re Kensington Int'l, Ltd.*, 368 F.3d 289, 301 (3d Cir. 2004); *Moran* v. *Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*); *In re Billedeaux*, 972 F.2d 104, 105 (5th Cir. 1992); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-1313 (2d Cir. 1988); *United States* v. *Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988). Those circuits' rulings are consistent with

the House and Senate reports accompanying enactment of § 455(a), which specifically observed that enactment of that provision was not designed to alter the preexisting standard of appellate review on disqualification issues, and that "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." H.R. Rep. No. 93-1453, at 5 (1974); S. Rep. No. 93-419, at 5 (1973).

As petitioner points out, however, the Seventh Circuit has stated in some cases that it will review recusal decisions *de novo*. *See Hook* v. *McDade*, 89 F.3d 350, 353 (7th Cir. 1996); *Taylor* v. *O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989); *United States* v. *Balistrieri*, 779 F.2d 1191, 1203 (7th Cir. 1985). For several reasons, however, this case is not an appropriate vehicle to resolve any divergence of views between the courts of appeals on this point.

First, the Federal Circuit did not issue any opinion in this case. Thus, although, as petitioner points out (Pet. 7), the Federal Circuit may well have followed the Eighth Circuit in applying an abuse-of-discretion standard in this case, it is impossible to know with certainty what standard of review was applied.[4] In addition, because the Federal Circuit did not offer any reasoning for its ruling, it is also impossible to be certain that the standard of review made any difference to the ultimate outcome in the case. The Federal Circuit may well have summarily affirmed because it concluded that the district court's decision was so plainly correct that it would survive any standard of review.

Second, even the Seventh Circuit—which is the only circuit that has stated that *de novo* review of recusal decisions is appropriate in some circumstances—has not suggested that it would apply *de novo* review under circum-

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[4] The Federal Circuit generally follows the law of the applicable regional circuit on issues unrelated to patent law, including issues concerning the disqualification of a trial judge. *See Hewlett-Packard Co.* v. *Bausch & Lomb Inc.*, 882 F.2d 1556, 1567 n.8 (Fed. Cir. 1989).

stances like those presented here, where a litigant seeks to undo a final judgment on the ground that the trial judge should not have heard the case in the first instance. To the contrary, the Seventh Circuit has made clear that a district court's denial of a Rule 60(b) motion based on 28 U.S.C. § 455(a) is subject to review on appeal only for abuse of discretion. *See Williamson* v. *Indiana Univ.*, 345 F.3d 459, 464 (7th Cir. 2003). As the Seventh Circuit has explained, the decision to reopen a final judgment under Rule 60(b) is generally committed to the district court's sound discretion, and such relief is to be awarded only under "exceptional circumstances." *See id.* None of the Seventh Circuit cases cited by petitioner in support of *de novo* review involved denial of a Rule 60(b) motion.[5] Thus, even if this case had been litigated in the Seventh Circuit, there is no reason to believe that that court would have applied any different standard of review or arrived to any different outcome.

b. This Court's review is also not warranted because the district court's decision to deny relief under Rule 60(b) was clearly correct and should be upheld under any standard of review. As this Court has explained, Section 455(a) warrants judicial recusal only when "a reasonable person, knowing all the circumstances," would doubt the judge's impartiality. *See Sao Paulo State of Fed. Rep. of Brazil* v. *American Tobacco Co.*, 535 U.S. 229, 232-233 (2002) (*per curiam*); *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988). In light of "all the circumstances," there could be no reasonable basis for doubting Judge Sippel's impartiality.

Judge Sippel made clear on the record that, before becoming a district judge, he never performed any work for Monsanto on the Pioneer litigation, never worked on any

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[5] *See Hook*, 89 F.3d at 352-353 (interlocutory mandamus petition); *Taylor*, 888 F.2d at 1193, 1200 (appeal from final injunction); *Balistrieri*, 779 F.2d at 1195-1196 (appeal from judgment of conviction). The same is true of the Second and Fifth Circuit cases in which dissenting judges argued in favor of *de novo* review. *See Billedeaux*, 972 F.2d at 104 (interlocutory mandamus petition); *Drexel Burnham*, 861 F.2d at 1309 (same).

saved-seed litigation, and did not work on any other cases for Monsanto after rejoining the firm in 1995. The only facts even tangentially connecting Judge Sippel to Monsanto were that (a) his former law partner, Joseph Conran, entered an appearance for him in the Pioneer litigation in case he would become free after the CVC litigation concluded, and (b) his name appeared in the signature block of various filings, most of which were pro forma motions for *pro hac vice* admission. Judge Sippel explained, however, that he did not review any of the papers filed for Monsanto in the Pioneer case. Petitioner's mere speculation to the contrary is insufficient to raise a reasonable question about Judge Sippel's impartiality.

This case is quite similar to *Sao Paolo*, where this Court ruled that the Fifth Circuit had erred in concluding that a district judge should have recused himself based on the fact that his name had appeared on an amicus curiae brief in a related matter. As the Court explained, the Fifth Circuit's recusal decision was mistakenly based on "what a reasonable person would believe *without* knowing (or giving due weight to the fact) that the judge's name was added mistakenly and without his knowledge." 535 U.S. at 233. The proper query, the Court made clear, is what a reasonable person in possession of all the relevant facts would believe. *See id.* In *Sao Paolo*, the district judge "took no part in the preparation or approval of the *amicus* brief; indeed, he was only 'vaguely aware' of the case." *Id.* This Court held that when those facts were taken into account, "it is self-evident that a reasonable person would not believe he had any interest or bias." *Id.* Similarly, Judge Sippel was at most "vaguely aware" of the Pioneer litigation. Moreover, his name did not appear on any filing with the attorneys for Monsanto in this case, none of whom worked at Husch & Eppenberger when Judge Sippel was a partner there.

Although petitioner relies heavily on *Liljeberg*, that decision has no application to this case. In *Liljeberg*, the presiding judge was a trustee of a university that was actively negotiating with one of the parties to a lawsuit before the

judge over the purchase of a parcel of land on which to build a hospital. 486 U.S. at 850. The judge remained a trustee during the negotiations and while the litigation was pending before him. The university stood to gain significantly from the sale, and the pending litigation directly affected the university's ability to continue negotiations. *Id.* at 853-854. There was therefore a direct connection between the pending sale, in which the university and the judge (as one of its trustees) were interested, and the litigation over which the judge presided. By contrast, there is no connection between the Pioneer case and this case. The Pioneer litigation was a commercial dispute between Monsanto and Pioneer; it did not involve saved seed and did not involve either soybeans or cotton, which are at issue in this case. Other than the fact that the Pioneer case, like this case, involved Monsanto's plant biotechnology—in the Pioneer case, utilized in corn—the two cases are entirely different.

Petitioner notes (Pet. 15-17) that, in *Liljeberg*, this Court concluded that "[s]cienter is not an element of a violation of § 455(a)," 486 U.S. at 859, and ruled that the district judge's impartiality was reasonably open to question in that case, even though the judge had momentarily forgotten the underlying facts that created the appearance of impropriety—namely, his participation, as a trustee of an interested party, in a pending real estate transaction related to the litigation before him. Petitioner argues that, so too here, Judge Sippel should have been required to recuse himself under § 455(a), even though he had long forgotten (if he ever knew) that his name had appeared on papers for Monsanto in the Pioneer litigation.

This argument misconceives the basis for the conclusion that Judge Sippel was not required to recuse himself. The central point is not that Judge Sippel forgot that his name appeared on the Pioneer papers; rather, it is that the Pioneer case created no basis for Judge Sippel's recusal in this case, for the Pioneer case had nothing to do with the instant litigation. Moreover, as Judge Sippel stated, he did no work on any saved-seed litigation at Husch & Eppenberger and no

work at all for Monsanto after he rejoined the firm in 1995. Thus, even if Judge Sippel had fully recalled the details of the Pioneer litigation, his recusal from this case still would not have been warranted.

Petitioner further argues (Pet. 17-18) that, because Judge Sippel had an attorney-client relationship with Monsanto, supposedly created by his appearance on papers filed for Monsanto in the Pioneer litigation, he must be presumed to have gained access to Monsanto's client confidences during that litigation. Again, however, petitioner's argument fails because of the lack of any connection between the issues in the Pioneer case and the issues in this case. And even if, when he was in private practice, Judge Sippel once had a duty of loyalty to Monsanto as a client arising out of the Pioneer litigation, the law presumes that Article III judges are able to shed such loyalties to former clients and render impartial justice once they take judicial office. Otherwise, a federal judge could never sit on any case involving a party that was once his client—but that is clearly not the law. *See Carr* v. *Fife*, 156 U.S. 494, 498 (1895); *Sphere Drake Ins. Ltd.* v. *All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002); *Chitimacha Tribe of La.* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982); *National Auto Brokers Corp.* v. *General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978).

2. Petitioner contends that the district court erred in denying his request for discovery in support of his Rule 60(b) motion. Pet. 12-13. That submission raises no issues warranting this Court's review. There is no dispute that discovery rulings on recusal motions are subject to review on appeal only for abuse of discretion, *see In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997), and that deference is only heightened where the recusal argument is made in support of a Rule 60(b) motion. Given that relief from judgment under Rule 60(b)(6), the provision invoked by petitioner, is available only in "extraordinary circumstances," *Ackermann* v. *United States*, 340 U.S. 193, 199, 202 (1950), it is entirely appropriate for a district court to deny discovery in support of such a motion where, as here, the movant has

not adduced evidence that on its face would suggest that relief from judgment would be warranted and has made discovery requests that are unreasonably broad. *Cf. H.K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) ("When two parties have opposed each other in a protracted lawsuit tried to judgment, . . . it is well within [the court's] discretion to require the moving party to make a showing in support of its allegations before requiring the prevailing party to submit a second time to extensive discovery to protect his judgment.").

Petitioner cites *In re Kensington International, Ltd.*, 353 F.3d 211, 223-224 (3d Cir. 2003), for the proposition that a party seeking recusal of a district judge is entitled to reasonable discovery in support of a recusal motion. That decision has little relevance in this context. *Kensington* did not involve a party's attempt to upset a final judgment under Rule 60(b), but rather was decided on an interlocutory petition for mandamus. The *Kensington* court therefore had no occasion to address the special concerns that are raised when a party seeks to invalidate an adverse final judgment by arguing that the district judge who heard the case should have recused himself. Moreover, although in *Kensington* the court of appeals ordered discovery in support of a party's recusal motion, the court did not suggest that the proper standard of review of district court decisions denying such discovery should be anything other than abuse of discretion.

Petitioner also cites Judge Kozinski's concurring opinion in *United States* v. *Washington*, 98 F.3d 1159, 1166 (9th Cir. 1996), for the proposition that a litigant may be entitled to discovery in support of a Rule 60(b) motion arguing that the district judge should have been replaced. In fact, Judge Kozinski concurred with the panel's conclusion in that case that the district court had not abused its discretion in denying discovery related to a Rule 60(b) motion. *See id.* Moreover, Judge Kozinski did not dispute the proper standard of appellate review of such a ruling is abuse of discretion, and he noted that a litigant would be entitled to such discovery

only if it "acted in good faith and made out a reasonable case that discovery might lead to relevant information." *Id.*

Petitioner's discovery argument therefore reduces to the submission that the district court abused its discretion in denying him discovery in support of his Rule 60(b) motion. That fact-bound contention does not warrant review in this Court and is without merit in any event. Judge Sippel denied discovery only after stating on the record that he had not participated in the Pioneer litigation, had never worked on any saved seed cases, and had not worked on any matters for Monsanto since rejoining Husch & Eppenberger in 1995. Moreover, petitioner's discovery requests were hardly made in good faith: he sought discovery of, inter alia, information about every invention Monsanto licensed to Pioneer, every matter prior to January 30, 1998, in which any lawyer associated with Husch & Eppenberger formed an attorney-client relationship with Monsanto (including the amount of attorney's fees paid by Monsanto), the total amount of attorney's fees paid by Monsanto to Husch & Eppenberger during an eight-year period, and descriptions of every communication by Monsanto or any person on behalf of Monsanto to Judge Sippel during the two years that he worked for Congressman Gephardt. Under any standard, those requests were unreasonable, and that fact alone is sufficient to sustain Judge Sippel's decision to deny those requests.

3. None of petitioner's additional arguments in support of certiorari has merit. First, petitioner argues (Pet. 10-12) that the importance of the issues in this case is somehow exacerbated by the fact that Monsanto commonly requires growers such as petitioner to agree, as part of the licensing agreement granting growers access to Monsanto's patented biotechnology, that any dispute between the parties will be adjudicated in the United States District Court for the Eastern District of Missouri. This argument is without substance. That aspect of the licensing agreement has been upheld as an unexceptionable forum selection clause between the parties. *See Monsanto Co.* v. *McFarling*, 302 F.3d 1291, 1294-1296 (Fed. Cir. 2002), *cert. denied*, 537 U.S.

1232 (2003); *see also Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593-594 (1991) (noting that "a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions"). Growers who object to the clause are free to decline Monsanto's offer of a license and to purchase soybean or cottonseed that does not include Monsanto's patented biotechnology. *See id.* at 595 (upholding forum selection clause where, as here, parties were "given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity").

Petitioner states (Pet. 11-12) that growers who are required to litigate these cases in the Eastern District of Missouri are "entitled to the absolute assurance—once they get to St. Louis—of an impartial district judge who will show Monsanto no favoritism." Petitioner cannot seriously maintain that no judge in that judicial district could render impartial judgment for growers merely because Monsanto is located in that district. Moreover, under 28 U.S.C. § 455, litigants before any federal court, not just the Eastern District of Missouri, are entitled to a judge who not only is, but reasonably appears to be, impartial; no special rules apply to judges of the Eastern District of Missouri merely because Monsanto resides there. Petitioner does not argue, in any event, that Judge Sippel did not *actually* render impartial justice in this case. Rather, petitioner's sole argument is that Judge Sippel's appearance on papers for Monsanto in an unrelated matter on which he did no work cast doubt on the appearance of his impartiality between the parties. As explained above (pp. 12-15, *supra*), that contention is without merit.

Petitioner also argues (Pet. 14-15) that the district court's "pattern of rulings" against him supports the inference that the district judge did not appear impartial. Those

rulings, however, reflected an entirely proper response on the part of the district court to petitioner's outrageous misconduct, which was demonstrated at every stage of this case. *See* pp. 3-4, *supra*; *Ralph I*, 382 F.3d at 1380-1382. Petitioner's infringement was plainly willful, and his willful misconduct amply justified a trebling of infringement damages under 35 U.S.C. § 284. Indeed, petitioner did not challenge the trebling of the infringement damages on appeal to the Federal Circuit.

In concluding that treble damages were warranted, the district court first remarked that "it is not the goal of this Court or the goal of the law or the goal of justice to put [petitioner] in a position to crush him." *Ralph I* C.A. App. 5934. The court then stressed, however, that "I cannot imagine more egregious conduct. I hope I never confront it by a litigant to a party who knowingly lies, knowingly uses the Court's order to hide more lies." *Id.* at 5936. The court also emphasized "[t]he duration of the conduct, the fact that . . . it continued through litigation," and the fact that petitioner "took no remedial action to correct his problems. He only exacerbated them." *Id.* at 5939. Those factors were fully sufficient to sustain the award of treble damages.

Similarly, the district court's decision to strike petitioner's pleadings was fully justified, as the Federal Circuit held on the prior appeal in this case. In rejecting petitioner's argument that a lesser sanction, such as a presumption that all the destroyed bags of seed contained infringing product, would have been sufficient, the Federal Circuit observed that this sanction "would have trivialized the magnitude of the harm caused by Ralph's behavior." *Ralph I*, 382 F.3d at 1381. The court of appeals further noted that other cases where dismissal sanctions were reversed on appeal were readily distinguishable because they "did not involve findings of willful violation of court orders, destruction of evidence, or subornation of perjury, as were present in this case." *Id.*

In the end, petitioner's objection to Judge Sippel is not that Judge Sippel provided an unfair hearing of his argu-

ments, but that Judge Sippel reacted as most district judges would to a similar tale of litigation abuse. As the court of appeals explained in upholding Judge Sippel's dismissal of petitioner's pleadings:

> The judicial system cannot tolerate litigants who flagrantly refuse to comply with the orders of the court and who refuse to make discovery, for delay and evasion are added burdens on litigation, causing waste of judicial and legal time, are unfair to the litigants and offend the administration of justice.

382 F.3d at 1381 (citation, brackets, and internal quotation marks omitted; capitalization altered). Petitioner has made no showing to suggest that this observation about his conduct was any less accurate than it was when the court of appeals made it a year ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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